IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO.2864 OF 1998

Shri Kamlakar G.Bhoir .. Plaintiff

vs

Smt.Leelabai Govind Thombre & ors..Defendants

Mr.P.S.Tiwari for Plaintiff

Mr.S.N.Shah for Defendant Nos. 1,9,10 & 11.

CORAM : A.S.OKA, J

DATED : 30th July, 2007

JUDGMENT

1. The suit was listed under the caption "undefended suits for ex parte decree". When the suit was called out on earlier occasion, it was brought to the notice of the learned counsel appearing for the plaintiff that the writ of summons has not been served to the defendant no.6. Learned counsel appearing for the plaintiff on instructions from the plaintiff stated that the plaintiff is not claiming any relief as against 6th to 11th defendants and the suit is pressed only as against 1st to 5th defendants herein.

2. The plaintiff has filed on record his affidavit in lieu of examination-in-chief. The said affidavit is marked 'X' for identification and is taken on record. The plaintiff has also filed the

original documents along with a list of documents. The said original documents along with the list are marked 'Y' (collectively) for identification and the same are taken on record. There is a separate affidavit of the plaintiff affirmed on 25th July, 2007. In the said affidavit, the plaintiff has stated that he was not pressing prayer clause (b) of the plaint as against 6th to 11th defendants. The said affidavit is marked 'Z' for identification and the same is taken on record.

3. Before appreciating the submissions made by the learned counsel appearing for the plaintiff, it will be necessary to refer to the facts of the case in brief.

4. The suit relates to land bearing survey no.36 (pt) City Survey no.782 admeasuirng 5321.4 sq.meters of village Nahur, Taluka Kurla, Bombay Suburban District. The 1st to 5th defendants are the legal representatives of the deceased Govind Keshav Thombre who died on 15th August, 1997. The suit is essentially for specific performance of the agreement for sale dated 22nd December, 1984 allegedly executed by the said Govind Keshav Thombre (hereinafter referred to as the said deceased) in favour of the plaintiff. As per the said agreement, the deceased agreed to sell the suit property in favour of the plaintiff for a lump sum price of Rs.2,00,000/-. The agreement recites

that a sum of Rs.51,000/- was paid by the plaintiff to the deceased by way of earnest money and the balance amount was to be paid on or before the execution of the conveyance. In the recitals of the agreement, it is stated that the deceased was seized and possessed and was otherwise entitled to sell the suit property. The agreement further recites that one M/s Bhandup Estate (6th defendant) are the owners of the suit property as per record of rights. Clause 2 provides that the deceased vendor shall cause the said M/s Bhandup Estate, the original owners to confirm this agreement.

5. It is alleged in the plaint that the deceased executed a General Power of Attorney dated 4th October, 1992 in favour of the plaintiff. The plaintiff's case is that the deceased had agreed to make out a marketable title to the suit property but the deceased failed and neglected to comply with the terms and conditions of the said agreement dated 22nd December, 1984. It is stated in the plaint that one Vijay Kumar Salian claimed to have purchased the suit property from the 6th defendant and the 9th to 11th defendants claimed to have purchased the suit property from the said Vijay Kumar Salian. It is stated that the deceased through the plaintiff as his Constituted Attorney filed a suit being Suit No.2047 of 1992 against the 6th defendant, 9th to 11th defendants and the said VijayKumar Salian for a declaration that the

deceased was the owner of the suit property. During pendency of the suit, the said Vijay Kumar Salian expired and 7th and 8th defendants herein were brought on record as heirs and legal representatives of the deceased Vijay Kumar Salian. The plaintiff has placed reliance on an interim order passed on a Notice of Motion taken out in the suit in the City Civil Court.

6. According to the case of the plaintiff on the basis of the suit agreement, following amounts were paid by him to the deceased:-

1. Rs.25,000/- on 13th November, 1990

2. Rs.35,000/-on 23rd November, 1990

3. Rs.25,000/- on 17th September, 1991

According to the case of the plaintiff, the deceased passed receipts for the said amounts in favour of the plaintiff.

7. A specific case has been made out in paragraph 5 of the plaint that 1st to 5th defendants were refusing to honour the suit agreement and were refusing to complete the sale of the suit property in favour of the plaintiff. The Contention of the plaintiff is that the suit agreement dated 22nd

December, 1984 is valid and subsisting and is binding on the 1st to 5th defendants being the legal representatives of the deceased vendor. Thus, the present suit has been filed for a declaration that the suit agreement is valid and subsisting and also for a declaration that 6th to 11th defendants have no right, title and interest in respect of the suit property. The plaintiff has also prayed for a decree of specific performance of the suit agreement.

8. Learned counsel for the plaintiff has invited my attention to the affidavit in lieu evidence of the plaintiff and the original documents placed on record. He pointed out that apart from the earnest money of Rs.51,000/-, the plaintiff has paid a further amount of Rs.85,000/- to the deceased vendor. He pointed out that a sum of Rs.25,000/- was paid on 13th November, 1990 against a receipt executed by the deceased vendor. He pointed out that a sum of Rs.35,000/- was paid on 23rd November, 1990 and a further sun of Rs.25,000/- was paid on 17th September, 1991 and for both the payments, receipts have been executed. He submitted that Suit No.2022 of 1991 was filed and prosecuted by the plaintiff in his capacity as the Constituted Attorney of the deceased vendor. He submitted that after the demise of the deceased vendor, 1st to 5th defendants who are the legal representatives of the deceased declined to abide

by the agreement and therefore, a legal notice was issued by the advocate for the plaintiff on 30th April, 1998 to the said defendants. He pointed out that a reply was received on 28th May, 1998 from the advocate for 1st to 5th defendants by which the said defendants declined to perform their part of the agreement and therefore, the present suit was filed on 25th June, 1998 for specific performance. He submitted that none of the 1st to 5th defendants have chosen to contest the suit and therefore a decree must follow. He placed reliance on a decision of the Apex Court in the case of Devalsab (Dead) by LRs Appellant v. Ebrahimsab F.Karajagi and another, Respondent) (AIR 2005 SUPREME COURT 1940). He also placed reliance on a decision of the learned Single Judge of this Court in the case of Abdul Mutalik Rajjak Musalman & Ors vs. Smt Khubai w/o Majidkha Musalman & Ors 2005 (1) ALL MR 593). He submitted that considering the payment of subtantial amount by the plaintiff, this is a fit case for exercising discretion in favour of the plaintiff. Learned counsel appearing for the defendant nos. 9 to 11 submitted that they have acquired title to the property through the 6th defendant and therefore, if this Court is inclined to pass a decree for specific performance as against the 1st to 5th defendants, rights of the said defendant nos. 9 to 11 will be seriously affected. He therefore submitted that a decree cannot be passed though a statement is made by the

learned counsel for the plaintiff that he does not want to press for any reliefs as against the 6th to 11th defendants.

9. I have carefully considered the submissions. It will be necessary to refer to the suit agreement. The suit agreement has been executed on 22nd December, 1984. As stated earlier, the agreed consideration was Rs.2,00,000/- and the agreement recites that a sum of Rs.51,000/- has been paid by the plaintiff to the deceased vendor as the earnest money and balance amount was to be paid on or before the execution of the conveyance. There is a recital in the suit agreement that M/s Bhandup Estate (6th defendant) consisting of Ratansey Karsandas andothers (Original khots) were the owners of the suit property. Clause no.2 has been specifically incorporated in the agreement to the effect that the vendor shall cause the said Bhandup Estate to confirm this agreement.

10. To show the readiness and willingness to perform his part of the agreement, the plaintiff is relying upon receipts dated 13th November, 1990, 23rd November, 1990 and 17th September, 1991 executed by the deceased in the sum of Rs.25,000/-, Rs.35,000/- and 25,000/- respectively. It is averred in the plaint that the plaintiff is ready and willing to pay the balance consideration of Rs.64,000/- payable under the suit agreement. The

last payment even according to the plaintiff is made on 17th September, 1991 in the sum of Rs.25,000/-. Apart from the bald statement that he was ready and willing to pay the balance consideration to the deceased, there is no evidence on record to show that after 17th September, 1991 till the notice was sent in the year 1998 any attempt made by the plaintiff to pay or to tender the balance consideration to the deceased. No particulars have been set out in the affidavit in lieu of examination-in-chief to show that after 1991, the plaintiff ever attempted to tender the balance consideration to the deceased vendor.

11. The delay and latches in filing the present suit in 1998 is sought to be explained by pointing out that the plaintiff in his capacity as the Constituted Attorney of the deceased vendor had instituted a S.C.Suit No.2047 of 1992 against defendant nos. 6 to 11 in the City Civil Court at Mumbai. A perusal of the plaint in the said suit annexed to the plaint shows that the plaint was affirmed by the deceased vendor himself. Learned counsel appearing for the plaintiff tried to point out a xerox copy of the affidavit filed in support of the Notice of Motion taken out in the said suit by the plaintiff. It must be noted here that in paragraph 4 of the affidavit in lieu of the examination-in-chief in this suit, the plaintiff

has stated that the said suit was filed by him in the City Civil Court in his capacity as the Constituted Attorney of the deceased. As stated earlier, a copy of the plaint in the earlier suit annexed to the plaint in the present suit shows that the earlier suit was filed by the deceased vendor himself. A perusal of the plaint in the said suit filed in March, 1992 shows that there is no reference to the execution of the suit agreement. The prayer in the said suit is for a declaration that the deceased vendor was a protected tenant and/or owner in respect of the suit property. Apart from the fact that there is nothing on record to show that the plaintiff instituted the suit on behalf of the deceased vendor in his capacity as the Constituted Attorney of the deceased, what is important here is that in the earlier suit there are no averments regarding execution of the suit agreement. In the letter dated 18th February, 1983, sent by the Advocate for the 1st to 5th defendants to Mr.V.R.Tripathi, Advocate for the plaintiff records that the appellant made several attempts to obtain a fresh Power of Attorney and vakalatnama of the 1st-5th defendants and the said defendants refused. The said letter is sent in connection with Suit No.2047 of 1992 filed in the City Civil Court. A copy of the said letter is annexed to the plaint. The notice dated 30th April, 1998 was issued by the plaintiff to the defendants calling upon defendant

nos. 1 to 5 to execute the conveyance in respect of the suit property. In the said notice, there is a bald assertion that the plaintiff had several times offered to pay the balance consideration to the deceased vendor and requested the deceased vendor to perform his part of the agreement. No particulars of the dates on which the amount was offered to the deceased vendor are mentioned in the notice. The notice was replied to by the 1st to 5th defendants. By the said reply, the 1st to 5th defendants disputed the execution of the said agreement and called upon the plaintiff to give inspection of the suit agreement. The plaintiff is placing reliance on the Power of Attorney dated 4th October, 1992 allegedly executed by the deceased vendor in his favour. A perusal of the said Power of Attorney discloses that there is no reference made therein to the suit agreement allegedly executed on 22nd December, 1984. If the suit agreement was valid and subsisting, there would have been a reference to the execution of the suit agreement in favour of the plaintiff.

12. Alongwith the affidavit in lieu of the examination-in-chief, the plaintiff has produced on record a certified copy of the consent terms filed by the 1st to 5th defendants herein and the other defendants in S.C.Suit No.2047 of 1992. The said consent terms record that the 1st to 5th defendants herein have received a sum of Rs.10,00,000/- from

the 3rd to 5th defendants in the said suit. The consent terms record that 1st to 5th defendants herein were withdrawing the suit as against defendant nos. 1 to 2A,2B and 2C, in the said suit for want of prosecution.

13. Under section 20 of the Specific Relief Act, 1963 grant of relief of specific performance of an agreement for sale of an immovable property is discretionery. In the present case, there is hardly any explanation in the plaint as to why the plaintiff waited till the year 1998 to file the suit for specific performance on the basis of the agreement dated 22nd December, 1984. As stated earlier, even according to the case of the plaintiff, last payment made by him to the deceased vendor was on 17th September, 1991. The explanation sought to be given is that the plaintiff in his capacity as the Constituted Attorney of the deceased vendor filed the aforesaid suit in the City Civil Court, Mumbai in 1992. As indicated earlier, there is nothing on record to show that suit was in fact filed by the plaintiff in his capacity as Constituted Attorney of the deceased vendor. Therefore, the present suit filed by the plaintiff suffers from delay and latches.

14. Even in the suit agreement, there is a recital that M/s Bhandup Estates is the owner of the suit property and the deceased vendor was to obtain a

confirmation from the said original owners. The plaintiff has impleaded the original owners Bhandup Estates as 6th defendants. However, the planitiff has never served the writ of summons to the 6th defendant. Now defendant nos. 9 to 11 are claiming to have acquired title from the 6th defendants M/s Bhandup Estates. The plaintiff has not served summons to the 6th defendants and is now saying that he does not want to press for any relief as against defendant nos. 6 to 11. Thus, the plaintiff wants to obtain a decree of a declaration and decree for specific performance without obtaining any relief against 6th defendants who was admittedly the owner of the suit property and as against other defendants who are claiming through 6th defendants. In substance, the suit is one for specific performance of the suit agreement. Even a grant of a declaration under section 34 of the Specific Relief Act, 1963 is also discretionery. As stated earlier, the plaintiff is not pressing prayer clause (b) and is not pressing the suit as against defendant nos. 6 to 11. In the absence of defendant nos. 6 to 11 who are disputing the rights of the plaintiff, the relief of declaration regarding the suit agreement cannot be granted. Considering the aforesaid aspects, this is a fit case where discretion to grant specific relief should not be exercised in against the plaintiff. The factors which are against the plaintiff are (i) very long delay and latches in

filing the suit and (ii) failure to claim any relief as against defendant nos. 6 to 11.

15. The Reliance placed by the learned counsel for the plaintiff on the decision in the case of Devalsab will not help the plaintiff. The Apex Court in the facts of the case before it held that the discretion exercised of the High Court against the plaintiff by declining to grant a decree of specific performance was not proper. The decision of the learned Single Judge in the case of Abdul Mutalik (supra) will not help the plaintiff to get over long andunexplaineddelay in filing the suit.

16. This is a fit case where discretionary relief of declaration and specific performance under the provisions of Specific Relief Act, 1963 cannot be granted in favour of the plaintiff though 1 to 5th defendants have not filed written statements. This is a case where even assuming that what is averred in the plaint is true and correct, the discretion cannot be exercised in favour of the plaintiff. There is no relief claimed in the plaint for refund of the earnest money.

17. Considering the aforesaid aspects, there is no merit in the suit. The suit is accordingly dismissed with no order as to costs.

(A.S.Oka, J)